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OPINIONS BELOW

The order of the United States District Court for the Western District of Tennessee, which denied BNSF's motion for judgment as a matter of law or a new trial, is unreported, and is reproduced in the Petition Appendix ("Pet. App.") at 116a-122a. The Sixth Circuit's initial decision is reported at 310 F.3d 443 (6th Cir. 2002), and is reproduced at Pet. App. 84a-115a. The Sixth Circuit granted rehearing en banc in an order reported at 321 F.3d 1203 (6th Cir. 2003), and reproduced at Pet. App. 123a-124a. The en banc decision is published at 364 F.3d 789 (6th Cir. 2004), and reproduced at Pet. App. 1a-83a. Following that decision, the Sixth Circuit denied a petition for further rehearing en banc, in an unpublished order that is reproduced at Pet. App. 125a-126a.

JURISDICTION

The court of appeals, sitting en banc, entered judgment on April 14, 2004, Pet. App. 1a, and denied further rehearing en banc on April 26, 2005, *id.* at 125a-126a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). On July 20, 2005, Justice Stevens extended the time for filing a petition in this case to and including August 24, 2005.

STATUTES OR OTHER PROVISIONS INVOLVED

Sections 701, 703, 704, 706, 709 and 717 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e, 2000e-2, 2000e-3, 2000e-5, 2000e-8 and 2000e-16) are excerpted in the Appendix to this brief.

STATEMENT OF THE CASE

The decision below dramatically expands without warrant the reach of section 704 of the Civil Rights Act of 1964, which prohibits discrimination against persons who oppose unlawful employment practices or participate in Title VII enforcement proceedings. The Sixth Circuit held that an em-

ployer can be liable for assigning an employee tasks within her job description, and for a temporary suspension that the employer rescinded (with full back pay) after investigation. Neither action is "an official act of the enterprise" that causes "a significant change in employment status," *Burlington Industries* v. *Ellerth*, 524 U.S. 742, 761 (1998), and thus neither can give rise to Title VII liability. Accordingly, the judgment below should be reversed.

1. Respondent Sheila White held the position of "Maintenance of Way Laborer" at BNSF's Tennessee Rail Yard in Memphis. Joint Appendix (JA) 58-61. The BNSF "Position Description" summarizes White's position as follows:

> The Maintenance of Way Laborer removes and replaces track components (e.g., ties, rails, bars, etc.) using various power and non-power hand tools. The Maintenance of Way Laborer may also lift and carry track material, cut brush, trees and vegetation, and clear the right-of-way of junk, litter and cargo spillage.

Id. at 58. The Position Description details "Key Work Activities" that are part of the job, most of which concern track and right-of-way maintenance and repair. *Id.* at 58-59. The last of these is that the laborer "[p]erforms all qualified duties, as necessary or requested by management." *Id.* at 59.

White's Position Description reflects that her job was physically demanding, and required substantial exertion and outdoor work in all kinds of weather. In addition to other skills, the Position Description lists as "Key Skill Requirements" the abilities:

- "to maintain balance while working in or around moving equipment, on uneven terrain, or on track ballast";
- "to lift or carry objects ... weighing over 50 pounds";
- "to maintain a high level of muscular exertion for an

extended period of time, involving the hands, arms, back or legs to lift, push, roll or carry objects"; and

- "to make quick or repeated movements (bending, stretching, twisting, reaching) with arms, legs, or body."

JA 60-61. The Position Description specifically provides that the job "involves working outdoors in a variety of weather conditions (e.g., heat, rain, wind, humidity, etc.)," "requires working around moving or heavy equipment," and "involves exposure to above average noise level." *Id.* at 61.

One of the Maintenance of Way duties at the yard involved operating a forklift to move supplies that were delivered to a loading dock. White had prior forklift experience and was assigned to operate the forklift. She testified that she spent a "majority" of her time using a forklift to unload materials that were delivered to the railyard, and a "good bit" of her time on other maintenance-of-way duties, which included working on derailments. I Trial Transcript ("Tr.") 87, 104-05; II Tr. 194-96; see also III Tr. 695. It is undisputed that the applicable collective bargaining agreement did not define a separate position for a forklift operator. The parties stipulated at trial that White was hired as a Maintenance of Way Laborer. I Tr. 38; II Tr. 303; IV Tr. 747. She operated a forklift as one aspect of the general track laborer duties she performed, which included a broad range of tasks related to railroad track maintenance. II Tr. 340; III Tr. 524, 530.

2. On September 16, 1997, White, who was the only woman working as a Maintenance of Way Laborer in the yard, complained that she was the victim of sexually harassing conduct by her immediate supervisor, Bill Joiner. JA 29. BNSF investigated, suspended Joiner without pay for ten days, and ordered him to attend a program on preventing sexual harassment. II Tr. 411, 420. On September 26, 1997, the roadmaster of the Tennessee Yard, Marvin Brown, informed White of the disciplinary action against Joiner. I Tr. 119-20.

At the same time, Brown informed White that she would not be assigned forklift duties. *Id.* Brown's explanation (which was disputed at trial) was that during the course of the investigation, the company discovered that other employees in the yard believed White had been unfairly assigned forklift duties (which are perceived by some as less physically demanding and cleaner than other track work, I Tr. 127-28; II Tr. 407), because other employees had greater seniority, III Tr. 505-06, 534, 617-18. The forklift duties were assigned to an employee with greater seniority, III Tr. 543, and White performed other duties within her job description as a Maintenance of Way Laborer, I Tr. 126-27; JA 58-61.

After being notified of this change in assignment, on October 10, 1997, White filed a charge with the EEOC alleging sex discrimination and retaliation. The discrimination charge was based on the original, allegedly harassing actions by Joiner, and the retaliation charge related to the change in White's duties. JA 29. On December 4, 1997, White filed a second charge of discrimination and retaliation, alleging among other things that Brown had placed her on increased surveillance, *id.* at 30; however, the EEOC determined that it could find no basis for this claim, *id.* at 22-23. That charge was mailed to Brown on December 8, 1997. IV Tr. 747.

Three days later, while on the right-of-way supporting a mobile crew, White was involved in a dispute with a supervisory employee, Sharkey, when she refused to accompany him as instructed. I Tr. 151-53. Sharkey reported White's acts to Brown. With authority from Brown, Sharkey informed White that she was suspended from service pending investigation for insubordination. II Tr. 188, 446; JA 31; see BNSF, *Employee Safety Rules*, Rule S-28.6, at 54 (Oct. 31, 2004), *available at* http://www.bnsf.com/employees/safety/pdf/EmployeeSafRevised080204.pdf (insubordination is a safety violation).

Employee discipline is governed by Rules 90 and 91 of the applicable collective bargaining agreement ("CBA") between the railroad and the Brotherhood of Maintenance of Way Em-

ployes. JA 56-57. Because Maintenance of Way employees are responsible for maintaining tracks and rights-of-way, they often work in mobile crews far from the railyard. To manage the potential dangers of railroading, it is critical that safety and operating rules are observed and lines of workforce authority respected. Accordingly, supervisors may remove recalcitrant, dangerous, or insubordinate workers from service.

Disciplinary removal from service may be ordered by relatively low-level supervisors in the field on a real-time basis, and the railroad and the union have agreed upon a procedure for the railroad to investigate any tentative disciplinary action that the employee believes is unwarranted, and to modify or revoke the action where appropriate. Under Rule 91 of the CBA, "[e]mploye[e]s disciplined or dismissed will be advised of the precise charge of such action, in writing if requested." CBA R. 91(a) (JA 56). An employee who considers the disciplinary action unfair or unjust "shall make written request for an investigation" within 15 days. CBA R. 91(b)(1) (JA 56).

At that point, the CBA provides a highly expedited timetable for an employer decision on discipline. Once the employee makes a proper written request, "a fair and impartial investigation .... will be held within 15 days," during which union representatives may be involved and the employee has the right to present any witnesses he desires. *Id.* R. 91(b)(2)-(3) (JA 56). The CBA dictates that "[*a*] *decision will be rendered by the Carrier* within 10 days after completion of the investigation." *Id.* R. 91(b)(5) (JA 57) (emphasis added). The Carrier may decrease or (as here) rescind the initial discipline; it also may impose additional discipline. III Tr. 552. Thus, it is the decision after the investigation that represents the company's final "decision" as to whether any discipline is proper. If the company decides not to sustain the charge against the employee, the CBA restores the employee to her former status: the charge "shall be stricken from the record," and "[i]f by reason of such unsustained charge the employe[e]

has been removed from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost while out of the service of the Carrier." CBA R. 91(b)(6) (JA 57).

These procedures established in the CBA for the Carrier's disciplinary decision are separate and apart from—and prior to—the invocation of grievance procedures. If the employee is "dissatisfied" with the company's "decision," she has "the right to appeal," CBA R. 91(b)(7) (JA 57), but the appeal is governed by the procedures set forth in a separate rule of the CBA (Rule 90). *Id.* RR. 90, 91(b)(8) (JA 54-56, 57). In other words, the Rule 91 investigatory procedure (through which White's complaint about her suspension was resolved) is part of the company's decisionmaking process, which can be (but was not here) appealed through the Rule 90 grievance mechanism. White requested a Rule 91 investigation of the suspension imposed by Brown within the 15 days specified by the CBA. II Trial Tr. 345. The Carrier's "decision," CBA R. 91(b)(5), (7) (JA 57), was that White's removal from service was unwarranted. That decision was made by the terminal manager of the Tennessee Yard. White was returned to service with full back pay (covering the 37 days she was suspended) and the charges were expunged from her record. III Tr. 642; JA 62; Pet. App. 7a.

3. After exhausting her administrative remedies with the EEOC, JA 20-25, 31, White filed suit against BNSF in the United States District Court for the Western District of Tennessee, alleging sex discrimination and retaliation, see JA 13-32. White presented two alternative theories of retaliation: that Brown retaliated against her by assigning the forklift duties she performed to another employee in September 1997 because she had filed her internal complaint, and by suspending her pending investigation in December 1997 because she had filed EEOC charges. *Id.*

The case was tried to a jury, which found for BNSF on White's underlying sex discrimination claim, and found for

White on her retaliation claim. Pet. App. 7a. The jury awarded her $43,250 in compensatory damages for emotional distress and related doctors' bills. *Id.*; JA 4. The district court denied BNSF's motion for a judgment as a matter of law, Pet. App. 116a-122a, and awarded White attorney's fees, see *id.* at 7a. BNSF appealed.[1]

A divided panel of the Sixth Circuit ruled that the judgment against BNSF should be reversed because neither action taken against White was sufficiently adverse to state a claim for retaliation under Title VII. Pet. App. 85a. It noted that White had suffered no loss of job title, and no diminution of salary, wages or benefits. *Id.* at 95a. The panel found it immaterial whether the duties she had been assigned to perform while on the right-of-way may have been more physically demanding than operating a forklift; BNSF "hired White as a track maintenance worker," and "[o]ne of her explicit job responsibilities was to maintain the railroad tracks." Accordingly, the panel held, "We fail to see how White suffered an adverse employment action by being directed to do a job duty for which Burlington Northern hired her." *Id.* at 96a. Nor, the panel held, was White's temporary suspension pending investigation (followed by reinstatement with full back pay) an adverse employment action. Her suspension was "the first step in the employment decision making process," and "was only an interim decision." *Id.* at 101a.

The court of appeals reheard the case en banc, and affirmed the verdict. After a lengthy discussion about the proper test for unlawful retaliation under section 704(a), the court concluded that the statute by its terms prohibits "'*any kind* of adverse action,'" and simply asserted that White's temporary suspension "is not the type of employment action that this

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[1] White cross-appealed the district court's ruling that she was required to prove her entitlement to punitive damages by clear and convincing evidence, and prevailed. Pet. App. 28a-34a. That issue is not before this Court. *See* Order of Dec. 5, 2005, 74 U.S.L.W. 3334 (U.S. Dec. 6, 2005) (05-259).

court developed the adverse-employment-action element to filter." Pet. App. 22a. As to the decision not to assign White forklift duties, the court concluded that the "new position" to which White purportedly was "transfer[red]" was "more arduous and 'dirtier,'" and that the forklift position had been more prestigious. *Id.* at 25a. Accordingly, the court concluded that this constituted an unlawful demotion, as "evidenced by 'indices ... unique to [the] particular situation.'" *Id.* (omission and alteration in original).

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment. Section 703 defines in detail the various forms of discrimination on the basis of race, color, religion, sex, and national origin that are prohibited as "unlawful employment practices" to employers, labor organizations, employment agencies, and joint labor-management committees. Section 704, at issue here, creates a different kind of protected class: It declares it an "unlawful employment practice" for any of the foregoing entities to "discriminate against" those who oppose certain practices as unlawful, or who commence or participate in Title VII proceedings. These are so-called retaliation claims.

A. Most courts of appeals (including, nominally, the court below) employ the same standard under both sections 703 and 704: An employer is only liable for unlawful discrimination when its actions actually affect the terms and conditions of employment. This is the same rule that this Court, drawing on prevailing "adverse employment action" jurisprudence, adopted in determining that sexual harassment culminating in a tangible employment action may be imputed to the employer. *Ellerth*, 524 U.S. at 761.

Even though the Sixth Circuit acknowledged that *Ellerth* states the prevailing standard, it wholly misconceived that standard. This Court in *Ellerth* held that for liability to attach, there must be "an official act of the enterprise, a company

act" that constitutes "a significant change *in employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761, 762 (emphasis added); see also *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 134 (2004) (a tangible employment action is "an *employer-sanctioned* adverse action *officially changing* her employment status or situation" (emphasis added)). Such official acts typically have an economic effect on the employee, are documented in company records, require use of internal processes, and are subject to higher management review and approval. *Ellerth*, 524 U.S. at 762. Those objectively verifiable traits give the employer the opportunity to monitor and correct lower-level supervisory actions (which ensures the voluntary compliance that this Court has declared a principal objective of Title VII).

B. Neither of White's retaliation claims satisfies the *Ellerth* standard. A supervisor's alteration of the mix of duties that an employee performs within her existing job classification simply is not an official act of the enterprise that constitutes a "significant change in employment status," and therefore is not an "unlawful employment practice" under section 704. *Ellerth* quoted approvingly the doctrine developed in the courts of appeals that a reassignment to a different position with *significantly* adverse changes in responsibilities may be actionable, but noted that mere alteration of job duties is not enough. Here, White was not transferred or demoted; at all times she retained her position as a Maintenance of Way Laborer at the Tennessee Yard. The track labor duties she was given were the central and essential duties of her position, and no different in kind from those she previously had performed or those that her fellow workers of equal or greater seniority were performing. Even in cases of actual position transfers, courts properly have held that simply being required to perform more stressful or challenging duties cannot support a Title VII claim. The Sixth Circuit's contrary rule would en-

mesh the courts in review of minor, commonplace supervisory task assignments, contrary to the Title VII policy against interference with traditional management prerogatives.

C. The Sixth Circuit's second holding—that an employer can be liable for a temporary suspension pending investigation that the employer rescinds with full back pay—is likewise irreconcilable with *Ellerth*. This Court has specifically held that unions and management may agree by contract as to what constitutes the employer's "decision" on personnel matters, and it is that "decision" that marks the point at which the allegedly unlawful employment practice occurs for Title VII purposes. Here, the collective bargaining agreement specifically provides that the "decision of the Carrier" on discipline occurs after investigation, and BNSF's "decision" was that White should be returned to work and awarded full back pay. The initial suspension pending investigation was not an adverse employment action. It was not an "employer-sanctioned adverse action officially changing her employment status or situation," *Suders*, 542 U.S. at 134, but rather an interim measure designed to allow BNSF to determine if it would approve or disapprove the supervisor's acts. It would undermine Title VII's fundamental purpose of encouraging voluntary compliance if employers could not avoid liability by reviewing supervisory discipline and making reasoned and informed decisions after investigation. Moreover, the Sixth Circuit's rule would place a significant penalty on the common and necessary practice of removing dangerous or disruptive employees from service without pay, subject to reinstatement with full back pay if the employer determines, after investigation, that removal was not appropriate.

D. Finally, this Court should reject the EEOC's attempt to reshape section 704 jurisprudence by eliminating the traditional adverse-employment-action standard, and substituting an unworkable standard that the employer is liable for any action, no matter how slight, that is reasonably likely to deter the charging party or others from protected activity. That

standard, as the Sixth Circuit pointed out, has no basis in the text of the statute. It perversely presumes that Congress intended to extend broader protection to Title VII complaints against retaliation than to employees who face discrimination in the workplace based on race, color, religion, sex, and national origin. The EEOC's interpretation creates a super-protected class, such that some adverse treatment of a female or minority employee for discriminatory reasons will not be actionable, but will become so if the employee has filed a retaliation claim. This distinction has no warrant in the statute, and creates disturbing workplace dynamics. The proper standard is the one set forth in *Ellerth*, which looks to whether employer conduct significantly changes employment status. BNSF clearly prevails under that standard.

ARGUMENT

I. EMPLOYER CONDUCT IS ACTIONABLE UNDER SECTION 704 ONLY IF IT ADVERSELY AND SIGNIFICANTLY CHANGES EMPLOYMENT STATUS.

In enacting Title VII, it "was the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices" that have created employment disadvantage for protected groups. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973). Title VII promotes the broad public "interest, shared by employer, employee, and consumer," in "efficient and trustworthy workmanship assured through fair and ... neutral employment and personnel decisions." *Id.* at 801. "The statute's primary objective is a prophylactic one; it aims, chiefly, 'not to provide redress but to avoid harm.'" *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 545 (1999) (citation omitted) (quoting *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 788 (1998)). "[T]he preferred means for achieving this goal" is "[c]ooperation and voluntary compliance." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). At the same time, Title

VII was meant to preserve "'management prerogatives ... to the greatest extent possible.'" *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 206 (1979); *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981) (Title VII was "not intended to 'diminish traditional management prerogatives'").

At issue here is the scope of section 704 of Title VII. The statute's preceding section outlaws employment discrimination on the basis of race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a). Section 704 (entitled "Other unlawful employment practices") further makes it "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment" because the employee has opposed conduct that is unlawful under Title VII, or commenced or participated in Title VII proceedings. *Id.* § 2000e-3(a).

The lower courts (and the EEOC, see *infra* Section II) all agree that the term "discriminate against" in section 704 cannot be interpreted, if it is to serve the statute's purposes, to reach every conceivable instance of different or adverse treatment of employees who have engaged in protected activity. See Pet. 11-16 (discussing cases); Pet. App. 9a ("Title VII does not define the phrase 'discriminate against,' which is repeated in Title VII's other anti-discrimination provisions, but courts have made clear that not just any discriminatory act by an employer constitutes discrimination under Title VII"); *Robinson* v. *City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (Alito, J.) (section 704 does not reach every "trivial personnel action that an irritable, chip-on-the-shoulder employee did not like" (internal quotation marks omitted)).

The Sixth Circuit below (like the vast majority of courts of appeals) properly has concluded that the same standard for determining whether discrimination is an actionable "unfair employment practice" applies under both sections 703 and 704. Pet App. 17a-18a & n.5. "To prevent lawsuits based upon trivial workplace dissatisfactions," the Sixth Circuit requires a plaintiff to prove "an 'adverse employment action' to

support a Title VII claim," which requires a "'materially adverse change in the terms and conditions of plaintiff's employment.'" *Id.* at 10a (alteration omitted). Not every trifling slight in the employment context should become a federal case. Although the court below paid lip service to its traditional "adverse employment action" standard, and asserted that it embodied "the same concept" as the "tangible employment action" standard set forth by this Court in *Ellerth*, see Pet. App. 10a n.1, the Sixth Circuit radically redefined that standard to encompass conduct that would not be actionable under *Ellerth* or under the law of the courts of appeals that are faithful to *Ellerth*. See, *e.g.*, *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997).

This Court should hold that section 704(a) of the Civil Rights Act, like section 703, prohibits as an "unlawful employment practice" only discrimination that results in "a significant change in employment status." *Ellerth*, 524 U.S. at 761. That standard entitles BNSF to judgment as a matter of law on White's retaliation claims.

A. The Same Standard for Discrimination Applies Under Sections 703 and 704 of the Act.

We begin on common ground with the court below: namely, that the standards for determining what employer conduct is actionable as "discrimination" in sections 703 and 704 of the Act are the same. Pet. App. 17a-18a & n.5.

The starting point in any matter of statutory construction is the text of the statute. *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). This Court has admonished that "[w]e do not ... construe statutory phrases in isolation; we read statutes as a whole." *United States* v. *Morton*, 467 U.S. 822, 828 (1984); *Bailey* v. *United States*, 516 U.S. 137, 145 (1995); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). "Statutory construction ... is a holistic endeavor" directed to determining which among "permissible meanings produces a substantive effect that is com-

patible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). "'[I]n expounding a statute, we [are] not ... guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989) (second alteration and omission in original) (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987)).

Section 704(a) makes it an "unlawful employment practice" for employers and other specified entities to "discriminate against" certain persons who oppose unlawful employment practices, or who commence or participate in Title VII proceedings. 42 U.S.C. § 2000e-3(a). The same terminology of "unlawful employment practice" and "discriminate against" appears in both sections 703 and 704 of the Act, see App. 2, 11, and so the two provisions should be read in harmony. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568, 570 (1995); cf. 2 Norman J. Singer, *Sutherland Statutory Construction* § 47:06, at 226 (6th ed. 2000) ("In construing ... the ... body[] of an act, ... all matter therein must be interpreted together."); see also *id.* § 46:5. Indeed, the structure of the statute demonstrates that the two provisions are closely related.

Section 703 contains the general prohibition against discrimination on the basis of race, color, religion, sex, and national origin. It is a lengthy and highly reticulated provision that identifies the major entities that may be responsible for employment discrimination, and proscribes specific kinds of discrimination by such entities as "unlawful employment practices." It does so for each of four types of employment entities: employers, employment agencies, labor organizations, and joint labor-management committees responsible for apprenticeship and training programs. 42 U.S.C. § 2000e-2(a)-(d). Some of the proscribed discriminatory conduct is specific to one type of entity; other conduct applies to multiple entities. Where employers are concerned, for instance, it is an "unlawful employment practice ... to fail or refuse to

hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," based on protected characteristics. *Id.* § 2000e-2(a). Employers also may not "limit, segregate, or classify [their] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," on such grounds. *Id.* § 2000e-2(a)(2). Employment agencies, for their part, may not "fail or refuse to refer for employment, or otherwise ... discriminate against[] any individual" based on protected status. *Id.* § 2000e-2(b). Specific prohibitions also forbid discrimination by labor organizations in their membership practices and their dealings with employers with regard to individual employees. *Id.* § 2000e-2(c).

Some of section 703's prohibitions overlap. For example, the prohibition of discrimination in training and apprenticeship applies to employers, labor organizations, and joint labor-management committees. *Id.* § 2000e-2(d). The prohibition against the "discriminatory use of test scores" applies to all four types of regulated entities. *Id.* § 2000e-2(l); see also *id.* § 2000e(n) (definition of "respondent"). Finally, section 703 sets forth a number of exemptions for practices that are not considered an "unlawful employment practice," such as discrimination based on bona fide occupational qualifications or seniority systems. *Id.* § 2000e-2(e), (h).

Sections 703 and 704 operate in tandem. Section 704(a) prohibits "discriminat[ion]" against one who "oppose[s]" any unlawful employment practice under Title VII, and discrimination against one who commences or participates in a Title VII "investigation, proceeding, or hearing," *id.* § 2000e-3(a); in short, it prohibits protected-activity discrimination. Section 704 does not restate all the detailed, sometimes distinctive, sometimes overlapping types of discrimination that are forbidden to each of the types of employment entities under section 703. Rather, in summary fashion, section 704 identi-

fies each of the four types of employment entities listed in § 2000e-2(a) through (d), and the specific types of persons protected against discrimination by each entity, and then states a single comprehensive prohibition that simply forbids covered entities from "discriminat[ing] against" such persons for opposing unlawful employment practices or participating in Title VII proceedings:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Id. § 2000e-3(a).

The most natural reading of section 704 is not that it profoundly redefines the type of conduct that constitutes actionable "discrimination," but rather that it creates an additional *protected class*: The same protection that section 703 affords against discrimination on the basis of protected characteristics, is afforded in section 704 to those who engage in protected activity related to Title VII enforcement. Notably, section 704(a) does not use the term "retaliation" or any variant of it; rather, it simply prohibits "discriminat[ion]" on the basis of certain protected activity. Thus, just as an employer may not "fail or refuse to hire or ... discharge any individual, or otherwise ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," because the individual is black or female or Mexican or Jewish, *id.* § 2000e-2(a), it also may not do so because

that individual has engaged in protected conduct that aids in the enforcement of Title VII.

Courts of appeals that have recognized the parallelism in sections 703 and 704 point out that any other reading would have the anomalous effect of extending *lesser* protection to the most deplorable, historically destructive forms of discrimination—the discrimination on the basis of the irrelevant personal characteristics of race, color, religion, sex, or national origin that has long consigned certain groups to lesser social and economic status—than to discrimination against those who oppose such invidious practices:

> Congress has not expressed a stronger preference for preventing retaliation under § 2000e-3 than for preventing actual discrimination under § 2000e-2. The prohibition on retaliation exists simply to ensure that employees will not fear to assert their substantive rights, which are the heart of Title VII.

Ross v. *Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985), *overruled on other grounds by Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989). Accordingly, nearly every court of appeals has read sections 703 and 704(a) in tandem, as coextensive and complementary provisions. See, *e.g.*, *Robinson*, 120 F.3d at 1300 ("'The language of "materially adverse employment action" that some courts employ in retaliation cases is a paraphrase of Title VII's basic prohibition against employment discrimination, found in 42 U.S.C. §§ 2000e-2(a)(1) and (2).'").[2]

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[2] *Accord Holcomb* v. *Powell*, __ F.3d __, 2006 WL 45853, at *10 (D.C. Cir. Jan. 10, 2006) (applying terms-and-conditions requirement to retaliation claim); *Fairbrother* v. *Morrison*, 412 F.3d 39, 56 (2d Cir. 2005); *Turner* v. *Gonzalez*, 421 F.3d 688, 696 (8th Cir. 2005); *Von Gunten* v. *Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) ("What is necessary in all § 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment adversely effected 'the terms, conditions, or benefits' of the plaintiff's employment."); *Sanchez* v. *Denver Pub. Schs.*, 164 F.3d

Section 704 is not the only place in Title VII where Congress used a summary prohibition against discrimination to incorporate the more detailed discrimination protections set forth in preceding provisions of the Act. In 1972, Congress extended Title VII protections to federal government employees, declaring that "there can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector." H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2158. Section 717 of Title VII summarily requires that "[a]ll personnel actions" against federal employees or applicants "be free from any discrimination" based on protected characteristics. 42 U.S.C. § 2000e-16(a). Courts have held that the section 703 and 704 standards likewise apply in claims brought under section 717 for unlawful "personnel actions."[3]

Even apart from section 703, the language of section 704 itself indicates that a materially adverse employment action is necessary to prove employer liability. Section 704 declares unlawful an "*employment practice*" of "discriminat[ing] against" an employee who opposes unlawful discrimination or participates in Title VII enforcement. 42 U.S.C. § 2000e-3(a) (emphasis added). This choice of language is significant, and connotes discrimination that negatively affects *the employment* of employees, not just any discriminatory act by a corporate agent against an employee. *Nelson* v. *Upsala Col-*

527, 533 (10th Cir. 1998); *Randlett* v. *Shalala*, 118 F.3d 857, 862 (1st Cir. 1997).

[3] *E.g.*, *Brown* v. *Brody*, 199 F.3d 446, 452-55 (D.C. Cir. 1999) (section 703); *Brazoria County, Tex.* v. *EEOC*, 391 F.3d 685, 692 (5th Cir. 2004); *Hale* v. *Marsh*, 808 F.2d 616, 619 (7th Cir. 1986); *Ayon* v. *Sampson*, 547 F.2d 446, 450 (9th Cir. 1976) ("in enacting § 2000e-16, Congress intended to, and did incorporate, into that section the provisions of the Civil Rights Act prohibiting harassment or retaliation for the exercise of those remedial rights established by the Act"); *see Dothard* v. *Rawlinson*, 433 U.S. 321, 331-32 n.14 (1977) ("Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike.").

lege, 51 F.3d 383, 388 (3d Cir. 1995) ("The words 'employment practice' suggest that the retaliatory conduct must relate to an employment relationship.") An "employment practice" that "discriminate[s] against" the employee necessarily requires final and materially adverse action affecting the employment status and opportunity of the employee. *Dodge* v. *Giant Food*, 488 F.2d 1333, 1335 (D.C. Cir. 1973) (section 703 case) (the term "discriminate against" does not refer to all differences in treatment, but "only those classifications or discriminations which afford significant employment opportunities to one sex in favor of the other"); Pet. App. 17a ("Having a different standard for different provisions of Title VII would be burdensome and unjustified by the text of the statute, which uses the same phrase "discriminate against" in each of its anti-discrimination provisions.").

While many acts of discrimination may occur in the workplace, it is difficult to conceive how employer discrimination could rise to the level of an "employment practice" unless it affected the "compensation, terms, conditions, or privileges of employment," 42 U.S.C. § 2000e-2(a), given the comprehensiveness of that latter phrase. "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent '"to strike at the entire spectrum of disparate treatment of men and women"' in employment." *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986); *Hishon* v. *King & Spalding*, 467 U.S. 69, 75-76 (1984) ("terms, conditions and privileges of employment" includes not only contractual terms and benefits but also "benefits that comprise 'the incidents of employment,' or that form 'an aspect of the relationship between employer and employees'" (internal citations omitted)).

Another provision of Title VII confirms that, to be actionable, an employer's action must be complete and must materially affect terms and conditions of employment. Sections 703 and 704 alike are enforced by a "civil action." 42 U.S.C. § 2000e-5(f)(1). Title VII originally provided a civil judicial action "to enjoin the respondent from engaging in such

unlawful employment practice," and authorized equitable relief such as reinstatement and back pay. Pub. L. No. 88-352, § 706(f), (g), 78 Stat. 241, 259-61 (1964) (codified as amended at 42 U.S.C. § 2000e-5(f), (g)). Congress would not have permitted invocation of the district court's extraordinary equitable powers to redress every minor discriminatory act that might aggrieve an employee. See *Weinberger* v. *Barcelo*, 456 U.S. 305, 311-12 (1982) ("It goes without saying that an injunction is an equitable remedy. It 'is not a remedy which issues as of course,' or 'to restrain an act the injurious consequences of which are merely trifling.'" (internal citations omitted)). The Civil Rights Act of 1991 broadened the *remedies* available to Title VII claimants (by making compensatory and punitive damages available, 42 U.S.C. § 1981a(a)(1), (b))—and thereby "put expansive pressure on the definition" of the statutory terms, *Ellerth*, 524 U.S. at 743—but importantly left unchanged the central Title VII *liability* language of "employment practice" and "discriminate against" in sections 703 and 704. In any event, the authorization of a civil jury action for damages underscores that Congress believed only material employment actions affecting terms and conditions of employment would be actionable.[4]

The requirement of an adverse employment action affecting the employment relationship promotes statutory purposes by imposing a meaningful threshold of materiality that "prevent[s] lawsuits based upon trivial workplace dissatisfac-

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[4] Title VII's recordkeeping provision also emphasizes the point. Congress expected employers to keep records relating to whether unlawful employment practices are occurring. Under section 708 of the Act, "[e]very employer, employment agency, and labor organization subject to this subchapter shall ... make and keep such records relevant to the determinations of whether unlawful employment practices *have been or are being committed*" as the EEOC requires by regulation or order. 42 U.S.C. § 2000e-8(c) (emphasis added). Tangible employment actions that represent the "official act of the enterprise" are the kind "documented in official company records," *Ellerth*, 524 U.S. at 762; so too is the execution of corporate policies against sexual harassment, *cf. id.* at 764-65.

tions." Pet. App. 10a. Title VII does not grant a federal civil action for "all workplace conduct" that is discriminatory or harassing, *Meritor*, 477 U.S. at 67, and is not meant to create a "general civility code," *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998). Only a "'tangible change in duties or working conditions that constitute[s] a material disadvantage'" is actionable. *Phillips* v. *Collings*, 256 F.3d 843, 848 (8th Cir. 2001). Discriminatory treatment causing intangible harms may also give rise to liability, but only if it alters the terms and conditions of employment to the employee's detriment. *Suders*, 542 U.S. at 143 ("Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment." (internal quotation marks omitted)). Thus, this Court has held that racial or sexual harassment not involving tangible employment action is actionable under Title VII if it is "*sufficiently severe or pervasive* 'to alter the conditions of [the victim's] employment *and* create an abusive work environment.'" *Meritor*, 477 U.S. at 67 (emphasis added) (alteration in original); *accord Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment ... is beyond Title VII's purview."); *Faragher*, 524 U.S. at 788 (harassment "must be *extreme* to amount to a change in the terms and conditions of employment" (emphasis added)). Incorporating the materially adverse employment action standard is thus the most natural way to read section 704 that is consonant with the text, structure, and purposes of Title VII.

B. This Court's Decision in *Burlington Industries* v. *Ellerth* Defines the Substantive Standard of Employer Liability.

This Court explained the "adverse employment action" standard in *Ellerth*, in which it addressed the circumstances under which an employer may be held vicariously liable under section 703(a) for a supervisor's sexual harassment of a coworker. The Court recognized that "the general rule is that

sexual harassment by a supervisor is not conduct within the scope of employment," and thus turned to whether the employer might still be held liable on agency grounds because the wrongdoer was aided by the agency relationship. 524 U.S. at 757-60. This Court held that vicarious liability would only arise on that basis if (a) the hostile work environment culminated in a tangible employment action against the employee, or (b) the employer could not prove that the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer in the exercise of due care. *Id.* at 761-62, 765; *Faragher*, 524 U.S. at 807.

Ellerth marks the path for resolution of this case. This Court "import[ed]" its "tangible employment action" standard from the prevailing "adverse employment action" jurisprudence in the courts of appeals under Title VII and other anti-discrimination laws. 524 U.S. at 761. The Court defined that term as "an official act of the enterprise" that constitutes "*a significant change in employment status*, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 761, 762 (emphasis added). While disclaiming endorsement of the specific results of any case, *Ellerth* cited approvingly the limitations the courts of appeals had placed on "adverse employment actions." Conduct resulting in a "'bruised ego,'" a "demotion without change in pay, benefits, duties, or prestige," and "reassignment to [a] more inconvenient job" were all "insufficient" to create employer liability. *Id.* (citing *Flaherty* v. *Gas Research Inst.*, 31 F.3d 451, 456 (7th Cir. 1994); *Kocsis* v. *Multi-Care Mgmt., Inc.*, 97 F.3d 876, 887 (6th Cir. 1996); *and Harlston* v. *McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994)).

As this Court elaborated in *Suders*, a tangible employment action is "an *employer-sanctioned* adverse action *officially changing* her employment status or situation." *Suders*, 542 U.S. at 134 (emphasis added). This standard reflects (as noted above) that, even though the term "employer" under

Title VII is broadly defined to include "any agent," 42 U.S.C. § 2000e(b), Congress did not intend that every discriminatory act of a corporate agent would give rise to Title VII liability:

> Unlike injuries that could equally be inflicted by a co-worker, we stated, tangible employment actions "fall within the special province of the supervisor," who "has been empowered by the company as ... [an] agent to make economic decisions affecting other employees under his or her control." [*Ellerth*, 524 U.S.] at 762. The tangible employment action, the Court elaborated, is, in essential character, "an official act of the enterprise, a company act." *Ibid.* It is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Ibid.* Often, the supervisor will "use [the company's] internal processes" and thereby "obtain the imprimatur of the enterprise." *Ibid.* Ordinarily, the tangible employment decision "is documented in official company records, and may be subject to review by higher level supervisors." *Ibid.*

Suders, 542 U.S. at 144-45 (omission and first and third alterations in original).

Limiting Title VII liability to meaningful employment actions, like the existence of affirmative defenses for certain adverse employment actions, fosters "Congress' intention to promote conciliation rather than litigation in the Title VII context." *Ellerth*, 524 U.S. at 764. "[O]fficial directions and declarations are the acts most likely to be brought home to the employer, the measures over which the employer can exercise greatest control." *Suders*, 542 U.S. at 148 (noting that absent such "'an official act of the enterprise,'" "the employer ordinarily would have no particular reason" to distinguish constructive discharge resignations from "the typical kind daily occurring in the work force").

In summary, under Title VII an employer may be held liable only for discrimination in the form of a materially ad-

verse employment action—*viz.*, (1) a tangible employment action causing "a significant change in employment status," *Ellerth*, 524 U.S. at 761, *i.e.*, "an employer-sanctioned adverse action officially changing her employment status or situation," *Suders*, 542 U.S. at 134, or (2) other actions or failures to act that are "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67 (alteration in original); *Faragher*, 524 U.S. at 797-801 (detailing agency rules and defenses relevant to imputation of the latter to employers).

As noted above, the Sixth Circuit answered the broader questions of statutory construction correctly. It rightly held that the standard for determining actionable employer conduct is the same in sections 703 and 704, Pet. App. 17a-18a & n.5; that the standard is whether the conduct was a materially adverse employment action, *id.* at 10a; and that *Ellerth* (which summarized and adopted the prevailing case law on such adverse employment actions) defines the proper standard, *id.* at 10a n.1. Nonetheless, the Sixth Circuit badly misconceived *Ellerth* in holding that the supervisory actions on which White relied to support her judgment met that standard. Neither (1) the assignment to White of duties within her job description other than operating a forklift nor (2) her removal from service pending investigation for insubordination, which was rescinded in a timely manner with full back pay, constitutes an "adverse employment action" that can support liability under *Ellerth* and prevailing case law.

C. Assigning White Routine Duties Within Her Job Description of a Kind That She and Fellow Employees Already Performed Is Not an Adverse Employment Action.

The court below tried to force-fit into the *Ellerth* standard Brown's decision to assign White to non-forklift duties, but its effort to do so cannot withstand scrutiny. According to the court of appeals, BNSF "transferr[ed] White from her forklift

operator job to a standard track laborer job." Pet. App. 25a. Further, the court stated, "the forklift operator position required more qualifications" than her "new position" as a track laborer, and there was evidence that "the forklift operator position was objectively considered a better job." *Id.* Accordingly, the court reasoned, this "transfer[]" was "a demotion," and thus sufficed for Title VII liability as a tangible employment action because it was "a job 'reassignment with significantly different responsibilities.'" *Id.* (quoting *Ellerth*, 524 U.S. at 761).

1. There was no "transfer[]" to "a new position." It is undisputed that White at all times held the position of "Maintenance of Way Laborer" at the Tennessee Yard. Indeed, there existed no separate "forklift operator position." White was hired as a track laborer, and operating a forklift was simply one duty she performed as a track laborer. I Tr. 87; II Tr. 194-96, 340; III Tr. 523-24.

That alone forecloses any claim that White suffered an adverse employment action—*i.e.*, "an employer-sanctioned adverse action *officially changing her employment status or situation*," *Suders*, 542 U.S. at 134 (emphasis added). A supervisor's directive that an employee perform different tasks within her job description is not an official change in employment status or situation. When *Ellerth* referred to "reassignment with significantly different responsibilities," it was referring to assignments to different positions. This is evident from the requirement stated in *Ellerth* (and confirmed by *Suders*) that a tangible employment action is the "official act of the enterprise," which represents "a significant change in employment status and typically "inflicts direct economic harm." 524 U.S. at 761, 762. Each of the four court of appeals cases upon which *Ellerth* relied involved actual transfers to a different position within the company.[5]

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[5] In deriving the tangible employment action standard, this Court in *Ellerth* quoted *Crady* v. *Liberty Nat'l Bank & Trust Co. of Indiana* for the proposition that:

2. Not only is it doublespeak to characterize a mere change in the mix of job tasks as a demotion, but in any event there was no evidence that White suffered "a *significant* change in employment status" in the form of "reassignment with *significantly different* responsibilities." *Ellerth*, 524 U.S. at 761 (emphases added). As the court of appeals stated in *Crady*, in a passage cited by this Court, *id.*, a "demotion" must be evidenced by "significantly diminished material responsibilities," and "a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities." *Crady* v. *Liberty Nat'l Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) (no actionable demotion where the transferred employee did not suffer an adverse change in pay or benefits, and the changed job responsibilities to which he was transferred were not "less significant" than his earlier duties).

The rule articulated in *Crady* and applied in *Ellerth* is emblematic of numerous courts' holdings under the adverse-employment-action standard. In *Harlston*, the Eighth Circuit held that a reassignment was not actionable because it did not affect "title, salary, or benefits," despite the fact that the

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> [a] materially adverse change might be indicated by a termination of employment, a *demotion* evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, *significantly diminished material responsibilities*, or other indices that might be unique to a particular situation.

524 U.S. at 761 (quoting 993 F.2d 132, 136 (7th Cir. 1993) (emphasis added)). But, in referring to a "demotion," *Crady* meant an actual transfer to a different job with "significantly diminished material responsibilities." Indeed, the employment action at issue in *Crady* was the transfer of a bank employee "from the Sellersburg branch manager position to a collections officer position in Charleston." 993 F.2d at 134-35. Similarly, *Harlston*—cited by *Ellerth* for the proposition that "reassignment to [a] more inconvenient job" is "insufficient"—involved a transfer to "a different position." *Harlston*, 37 F.3d at 381. The same is true of the other two cases cited in *Ellerth*: In *Kocsis*, the plaintiff had been transferred from the job of nursing supervisor to unit registered nurse, 97 F.3d at 878-79, and in *Flaherty*, the plaintiff was offered a transfer from the position of principal scientist to fuel cell project manager, 31 F.3d at 457.

plaintiff had been shifted to job duties that were "more stressful." 37 F.3d at 381-82. In *Boone* v. *Goldin*, the Fourth Circuit specifically relied upon *Ellerth* to hold that "reassignment can only form the basis of a valid Title VII claim if the plaintiff can show that the reassignment had some significant detrimental effect on her." 178 F.3d 253, 256 (4th Cir. 1999). Many other decisions hold likewise.[6]

3. White suffered no such adverse change in the compensation, terms, conditions or privileges of her job. At all times, she remained within the job for which she was hired. And at all times, she continued to perform the ordinary duties of a Maintenance of Way Laborer that were within her job description, that she had performed, and that her co-workers also performed. Indeed, the duties that White complains about being given are the essence of the position that she held:

> The Maintenance of Way Laborer removes and replaces track components (e.g., ties, rails, bars, etc.) using various power and non-power hand tools. The Maintenance of Way laborer may also lift and carry track material, cut brush, trees and vegetation, and clear the right-of-way of junk, litter, and cargo spillage.

JA 58 (Position Description). The overwhelming majority of a track laborer's duties enumerated in the position description concerned the maintenance of railroad tracks and roadbed.

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[6] *See, e.g.*, *Turner* v. *Gonzalez*, 421 F.3d 688, 697 (8th Cir. 2005) (requiring "a significant change in working conditions or a diminution in the transferred employee's title, salary, or benefits"); *Marrero* v. *Goya of P.R., Inc.*, 304 F.3d at 23 (1st Cir. 2002) ("a transfer or reassignment that involves only minor changes in working conditions normally does not constitute an adverse employment action"); *Galabya* v. *New York City Bd. of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000) ("a transfer is an adverse employment action if it results in a change in responsibilities so significant as to constitute a setback to the plaintiff's career"); *Williams* v. *Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) ("A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either.").

White's job included the duties of pulling spikes from railroad ties; drilling holes through rails; cutting rails; removing, installing and moving railroad ties; lifting and carrying track material; lifting objects in excess of 50 pounds; maintaining "a high level of muscular exertion for an extended period of time"; and numerous other such manual tasks associated with track maintenance. *Id.* at 58-61.

It should have come as no surprise to White that she would be asked to perform these duties. Not only were they listed on the Position Description, but White had in fact previously lifted heavy objects, see I Tr. 72, 73, 75—which she claims to have enjoyed, see I Tr. 72, and which she touted on her job application, JA 53 (noting her prior "[u]se of hands, heavy lifting, working with jack[] hammers and other heavy machinery"). And, during the period that White operated the forklift, she performed other track laborer duties. White maintained, oiled and swept rail switches, which consumed a "good bit" of her time, II Tr. 194-96. White testified that she worked on a derailment, which of course was track work. I Tr. 104-07. And, her supervisor testified that depending on the volume of the materials that had to be moved with the forklift on a given day, White might have been "out there as much as" the other track laborers were. II Tr. 408.

Thus, even if a shift in the mix of an employee's duties could ever be actionable absent an official reassignment to a new position, there is nothing in the record that rises to the level of demonstrating "significantly different responsibilities," *Ellerth*, 524 U.S. at 761, much less "'a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities,'" *id.* (quoting *Crady*, 993 F.2d at 136). White was not demoted—she retained the same job. And her wage, salary, title, and benefits remained precisely the same. White's *only* claim is that the track duties were "more physical," I Tr. 127, in that they required more heavy lifting, II Tr. 407, and were "much dirtier," I Tr. 128. These

vague assertions simply do not establish "significantly different responsibilities," *Ellerth*, 524 U.S. at 761, particularly given that White already performed these "more physical" and "dirtier" duties some of the time—and they are the same duties performed by her coworkers. "A transfer involving only minor changes in working conditions and no reduction in pay or benefits will not constitute an adverse employment action,' '[o]therwise every trivial personnel action that an irritable ... employee did not like would form the basis of a discrimination suit.'" *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (alteration and omission in original).

Courts repeatedly have held that changes of this sort are not sufficiently material to support Title VII liability. In *Marrero* v. *Goya of Puerto Rico, Inc.*, although the jury could have found that the plaintiff "was required to do more work" in her new job (in addition to other claimed disadvantages), this was not enough. 304 F.3d 7, 24-25 (1st Cir. 2002). In *Conley* v. *Village of Bedford Park*, the plaintiff likewise was unsuccessful in claiming that an unpleasant work assignment (a months-long painting job) was discriminatory. 215 F.3d 703, 712 (7th Cir. 2000). The court rejected this claim because—as here—the plaintiff previously had performed similar tasks; another worker also had done so; and so "the assignment seems to be well within the scope of normal activities for a" worker in the plaintiff's position. *Id.*

4. To reach any other conclusion on the facts of this case would cause untold disruption in innumerable workplaces when an employee has filed an employment discrimination claim, been named as a witness, or otherwise opposed allegedly unlawful discrimination. Such a result would create a federal case out of every management decision to alter the mix of an employee's duties within his or her job description. The already extraordinary number of Title VII retaliation filings would multiply. A construction worker could state a claim if he or she were asked to pour concrete rather than operate a jackhammer; an accountant could complain about be-

ing shifted to do expense control and reimbursement rather than the more prestigious task of preparing financial reports; a landscape laborer could complain about being shifted from the riding mower to the dirtier tasks of mulching, weed control, or grading. A law firm associate might complain that he is now merely writing briefs rather than trying cases, which might be perceived as advantageous to partnership prospects. Of course, it is not just modifications in job duties that would be potentially actionable; the *failure* to give the Title VII complainant tasks that were assigned to others would likewise support a retaliation claim under White's theory of Title VII. This would put the courts in the business of scrutinizing the minutiae of every task assignment to determine whether the duties were appropriately assigned, a task for which the courts are singularly ill-suited. *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.").

Extending Title VII liability in this fashion would mean as a practical matter that a Title VII complainant or witness could not be subject to normal supervision and direction by management. Plaintiffs often argue that retaliatory motive is a matter of jury inference, so if minor job modifications are actionable, any supervisory action that is arguably adverse becomes a basis for litigation. To avoid litigation risk, employers would have little option but to treat with kid gloves any employee involved in any way with a discrimination claim, and to ensure that any modification of duties for such an employee is inarguably neutral or preferential—or to entirely forgo task modifications that the needs of the business require. And, because the standards under 703 and 704 are the same, see *supra* at 16-17, these same untoward effects would mean a monumental, across-the-board expansion of liability.

Such a wasteful result flies in the face of this Court's repeated admonition that Title VII was intended to "maint[ain]

... employer prerogatives." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 242 (1989); *accord Burdine*, 450 U.S. at 259 (Title VII was "not intended to 'diminish traditional management prerogatives'"). As Justice Brennan explained for this Court in *Local Number 93, Int'l Ass'n of Firefighters* v. *Cleveland*:

> Congress was particularly concerned to avoid undue federal interference with managerial discretion.... [T]he liberal Republicans and Southern Democrats whose support was crucial to obtaining passage of [Title VII] expressed misgivings about the potential for Government intrusion into the managerial decisions of employers and unions beyond what was necessary to eradicate unlawful discrimination. Their votes were obtained only after they were given assurances that "management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible."

478 U.S. 501, 519-20 (1986) (internal citation omitted); *accord Weber*, 443 U.S. at 206.

To permit suit for a minor modification of job duties within an employee's conceded job description would without doubt "'diminish traditional management prerogatives,'" *Burdine*, 450 U.S. at 259—the assignment of work duties is among the most basic of management prerogatives, and is essential to the efficient functioning of every work place, from construction site to investment bank. An employer cannot function if every minor job modification raises the specter of employment discrimination, and there is nothing in Title VII to suggest that Congress intended such an extraordinary result. This Court should hold fast to the requirement of "an *employer-sanctioned* adverse action *officially changing* her employment status or situation." *Suders*, 542 U.S. at 134 (emphases added). A supervisor's assigning an employee ordinary and essential tasks within her job description that her coworkers routinely perform is not an "unlawful employment practice" of "discriminat[ion]" actionable under section 704.

5. Such a rule does not condone less serious retaliatory acts in the workplace, nor mean that discriminatory task changes and comparable supervisor conduct are necessarily immune under Title VII. Most circuits (including the Sixth Circuit) recognize a claim of retaliatory hostile work environment under section 704 if the retaliation is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67 (alteration in original).[7] The retaliatory singling out of a Title VII complainant to perform abusive, demeaning or dangerous tasks might (in given circumstances) support the elements of a hostile-work-environment claim. Here, however, White has not alleged that she was assigned to perform abusive or harassing tasks; as noted above, she was assigned the same standard duties that her fellow maintenance-of-way workers typically performed. Moreover, as the Sixth Circuit noted, White did not raise a retaliatory hostile-work-environment claim. Pet. App. 10a n.1. It is under this rubric that allegations of the kind White makes should be analyzed.[8]

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[7] *See* Pet. App. 10a n.1; *Marrero*, 304 F.3d at 26; *Von Gunten*, 243 F.3d at 865; *Ray* v. *Henderson*, 217 F.3d 1234, 1245 (9th Cir. 1997); *Richardson* v. *New York State Dep't of Corr. Serv.*, 180 F.3d 426, 446 (2d Cir. 1999); *Gunnell* v. *Utah Valley State Coll.*, 152 F.3d 1253, 1264-65 (10th Cir. 1998); *Knox* v. *Indiana*, 93 F.3d 1327, 1334-36 (7th Cir. 1996); 2 Lex K. Larson, *Employment Discrimination* § 34.04, at 34-59 to -61 & nn.36-37 (2d ed. 2004).

[8] It is only sensible to apply the hostile-work-environment standard to such claims. The hostile-work-environment standard does attempt to pin liability to specific—often minor—supervisory acts, and is flexible enough to account for the totality of circumstances, including retaliation both in and outside of the workplace. *Meritor*, 477 U.S. at 60, 67 (noting that conduct outside the workplace may contribute to a hostile work environment). And, as opposed to White's theory of Title VII, it would ensure that only retaliation that creates a seriously adverse change in working conditions may subject the employer to liability. Moreover, applying such a standard to lesser retaliatory acts promotes the essential Title VII objective of "cooperation and voluntary compliance." *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982). Employers would have the incentive to

D. White's Temporary Removal from Service, Which Was Rescinded with Back Pay, Is Not Actionable.

White also sought to prove that Brown retaliated against her when, as she stated in her EEOC charge, she "was put on suspension pending an investigation" into the supervisor's charge that she had been insubordinate. JA 31; see also *id.* at 17 (in her complaint, referring to a "suspension" pending investigation); *id.* at 35. After investigation, the terminal manager of the Tennessee Yard decided that the removal from service was unwarranted, returned White to service, expunged the charges from her record, and awarded her full back pay for the days she did not work. I Tr. 39; III Tr. 642; JA 62. Even though BNSF promptly investigated and vacated the allegedly retaliatory suspension, the Sixth Circuit nonetheless held that BNSF still is liable to White for the supervisor's erroneous suspension: "*any kind* of adverse action" by a supervisor, even temporary, suffices to create employer liability if it is not trivial in effect. Pet. App. 22a. According to the Sixth Circuit, "[t]aking away an employee's paycheck for over a month is not trivial, and if motivated by discriminatory intent, it violates Title VII." *Id.*

A temporary suspension for insubordination that the employer disapproves after prompt investigation (with full back pay) simply cannot be characterized as "an *employer-sanctioned* adverse action *officially changing* her employment status or situation." *Suders*, 542 U.S. at 134 (emphases added). The initial investigatory suspension was not the official decision of the company under the terms of the CBA, and the action that is properly attributable to the company—*viz.*, rescinding the suspension and awarding back pay—did not adversely affect the compensation, terms, conditions or privi-

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develop retaliation-specific corporate policies to prevent initial supervisory retaliatory acts from festering into hostile-work-environment claims, so as to take advantage of the *Ellerth/Faragher* affirmative defense. *Faragher*, 524 U.S. at 780; *Ellerth*, 524 U.S. at 764-65.

leges of White's employment. To permit liability under such circumstances would be inconsistent with this Court's teachings about corporate liability and its precedents about when a cause of action for discrimination accrues, and would undercut the collective-bargaining process and prevent employers in a wide range of circumstances from exercising normal prerogatives to maintain workplace discipline.

1. Discipline at the Tennessee Yard is governed by Rules 90 and 91 of the CBA negotiated by the railroad and the Brotherhood of Maintenance of Way Employes. *Supra* at 5-6. Significantly, Rule 91 distinguishes between immediate disciplinary action by supervisors and a subsequent "decision of the Carrier" on discipline. It allows a disciplined or dismissed employee to be advised of the charge, and upon receiving it, to "make written request for [an] investigation" of any allegedly unjust or unfair treatment within 15 days. JA 56. At that point, the CBA provides an expedited timetable for an employer decision on discipline. "[A] fair and impartial investigation ... will be held within 15 days" of the request, CBA R. 91(b)(2) (JA 56), and "[*a*] *decision will be rendered by the Carrier* within 10 days after completion of the investigation." *Id.* R. 91(b)(5) (JA 57) (emphasis added). If the company decides that the discipline was unwarranted, the discipline is vacated and the employee is restored to his or her prior position: The charge "shall be stricken from the record," and "[i]f by reason of such unsustained charge the employe[e] has been removed from position held," the employee shall be reinstated with full back pay. CBA R. 91(b)(6) (JA 57).

2. Here, the CBA makes clear that the initial suspension of White pending investigation was "not the official act of the enterprise," *Ellerth*, 524 U.S. at 762, but rather was temporary and tentative. BNSF's "official act" was its "decision" after investigation, pursuant to Rule 91 of the CBA, that White should not be removed from service, CBA R. 91(b)(5), (7) (JA 57), and that the investigatory suspension would be re-

scinded with full back pay.

Any other rule would deny employers the ability to have their senior management make reasoned decisions on employee discipline based on factual investigations. Many employers subject to Title VII operate through complex organizations. Corporate decisionmaking often occurs across multiple levels of hierarchy; important matters such as employee discipline may be decided initially at lower levels of management, and may require subsequent investigation and tiered review by upper management. The "adverse employment action" requires "an official act of the enterprise, a company act." *Ellerth*, 524 U.S. at 762. "The supervisor often must obtain the imprimatur of the enterprise and use its internal processes," including senior management review. *Id.* If the supervisor's action officially changing the plaintiff's employment status is effective, then "the supervisor and the employer merge into a single entity." *Id.* But, if the employer rejects and corrects the supervisor's action, it is not a company act that qualifies as an adverse employment action. What is more, the anomalous Sixth Circuit rule would *punish* the employer for correcting the initial action, because the plaintiff undoubtedly will argue to the jury that the withdrawal of the suspension and award of back pay themselves were evidence that the initial action was unjustified and therefore discriminatory.

Consistent with *Ellerth*'s focus on "an official act" of the company, *Suders*, 542 U.S. at 150, courts of appeals repeatedly have denied liability for corrected actions, even though the uncorrected action might have violated Title VII. In *Dobbs-Weinstein* v. *Vanderbilt University* (which the decision below limited to its facts in the course of seeking to distinguish it, see Pet. App. 19a-22a & n.7), the Sixth Circuit considered a professor's claim that a denial of tenure violated Title VII even though the decision subsequently was reversed and full back pay given. 185 F.3d 542, 544 (6th Cir. 1999). The court held that the remedied action did not give rise to

liability. The initial denial of tenure was not "the last word" on the matter, *id.* at 545, and therefore the plaintiff did not "suffer[] a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII," *id.* at 546. The denial of tenure was simply an "interlocutory or mediate decision," *id.* at 545, and recognizing a cause of action under such circumstances would "encourage litigation" at the expense of "internal grievance procedures," *id.* at 546. Other courts hold likewise.[9]

Indeed, it defies reason to believe that Congress would have considered a rescinded investigatory suspension with full back pay to be an "unlawful employment practice," when there would be no relief that could be granted in an equitable action under section 705, 42 U.S.C. § 2000e-5(f) & (g), which for most of the Act's history was the only remedy available. The Sixth Circuit found it significant that White could now seek emotional distress damages after the 1991 amendments, Pet. App. 23a, but the authorization of additional remedies did not alter the scope or meaning of "unlawful employment practices" under section 704. The Sixth Circuit improperly blurs the distinction between what conduct creates liability, and what remedies are available once liability attaches.

3. The Sixth Circuit justified its disregard of BNSF's corrective actions with the assertion that in cases dealing with Title VII's statute of limitations, "[t]he Supreme Court has rejected the argument that the pendency of an internal grievance process renders the employment decision 'tentative' or 'non-final' for purposes of Title VII." Pet. App. 23a. That reasoning misconceives the facts. White's initial suspension

[9] *Accord Taylor* v. *Small*, 350 F.3d 1286, 1293 (D.C. Cir. 2003) ("An employer may cure an adverse employment action ... before that action is the subject of litigation."); *Okruhlik* v. *University of Arkansas*, 395 F.3d 872, 879-80 (8th Cir. 2005); *Estades-Negroni* v. *Associates Corp. of N. Am.*, 377 F.3d 58, 63 (1st Cir 2004); *Pennington* v. *City of Huntsville*, 261 F.3d 1262, 1267-68 (11th Cir. 2001); *Brooks* v. *City of San Mateo*, 229 F.3d 917, 929-30 (9th Cir. 2000); *Breaux* v. *City of Garland*, 205 F.3d 150 (5th Cir. 2000).

was always tentative, and was withdrawn as part and parcel of the Carrier's disciplinary "decision" under Rule 91(b)(5). JA 57. Grievances and appeals are governed by a wholly separate provision (Rule 90). *Id.* at 54-56. It is only when an employee is "dissatisfied" with the Carrier's "decision" on discipline that she has the right to pursue an appeal through a Rule 90 grievance. CBA R. 91(b)(7)-(8) (JA 57).

Indeed, this Court's statute of limitations precedents affirmatively support BNSF. This Court has recognized the possibility that a union and employer may "agree[] to a contract under which management's ultimate adoption of a supervisor's recommendation would be deemed the relevant" decision for purposes of the anti-discrimination laws. *International Union of Elec., Radio & Mach. Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 234 (1976). Here, labor and management negotiated a collective bargaining agreement by which the employer renders its decision on discipline after initial investigation, with a separate grievance and appeal process available thereafter.

Moreover, in both *Robbins & Myers* and *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), this Court sought to determine when the employer had "established its official position." *Ricks*, 449 U.S. at 261, 262. Importantly, the Court did not simply look to the first decision made by a corporate employee. See *id.* at 252-54, 261-62 & n.17; *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 111 (2002) (in *Robbins & Myers*, "the discriminatory act occurred on ... the date that the parties understood the termination to be final"). Instead, it sought to identify the company's "employment decision." *Ricks*, 449 U.S. at 261; see also *id.* (focusing on "when the employer's decision is made"). Here, for all of the reasons set forth above, BNSF's "official position" was established, and its "employment decision" was made, only when it determined after investigation that White's suspension

should be rescinded.[10]

The result might *arguendo* have been different if the company had upheld the suspension. But it did not, and for that reason the discussion of grievance procedures in *Ricks* and *Robbins & Myers* is beside the point. As the Court explained in *Ricks*, a grievance process "is a *remedy*" for a decision that already has been made; it is a "method of collateral review of an *employment decision*." *Id.* (second emphasis added). But here, the rescission of White's suspension was, by operation of the CBA, itself the "employment decision," and the CBA in this regard is determinative. *International Union*, 429 U.S. at 234. The relevant point in time is "when the employer's decision is made," 449 U.S. at 261, and that decision here caused no adverse change in the compensation, terms, conditions or privileges of White's employment.

Permitting a cause of action under these circumstances would thwart Title VII's stated preference for "conciliation," mediation and "voluntary compliance," *Ellerth*, 524 U.S. at 764; *Ford Motor*, 458 U.S. at 228, and would undermine the primacy of collective bargaining in the unionized workplace. In the CBA that governs here, the union and management negotiated and agreed to a process that, they determined, best serves the collective interests of labor and management. The CBA preserves management's right to order disruptive, insubordinate and noncompliant employees removed from service. The union and management deemed the employee fully protected by the bargained-for procedure, which entitles the employee to an investigation, the right to present witnesses, a Carrier decision on an expedited schedule, and the compre-

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[10] There was testimony that White would have been terminated if she did not formally request an investigation within the 15-day period. III Tr. 553-54. BNSF has no such policy, *see* JA 56-57; *but cf.* Pet. App. 6a (mistakenly asserting same), but even if it did, termination would have been a separate action. The only initial discipline was a suspension pending investigation, and the only company act was the decision not to discipline and to rectify the suspension.

hensive remedies of expunging the employee record, reinstatement, and full back pay. Labor and management agreed on what constitutes the "decision of the Carrier" on discipline, and that "decision" was not adverse to White.

4. The Sixth Circuit's contrary rule, if adopted, would have significant consequences for the normal, safe and efficient operation of businesses around the country. Despite employers' best efforts, inappropriate, unsafe, and even illegal conduct occurs regularly in the American workplace. This includes the use of alcohol and illegal drugs, fighting, stealing, and the violation of work and safety rules. Such behavior threatens employee safety, company property, and the efficient operation of the business—and sometimes public safety.[11] Where railroads are concerned, insubordination—the infraction for which White temporarily was suspended—cannot be countenanced, for it is through clear lines of authority that safety and efficiency are maintained. See *Parrish* v. *Worldwide Travel Serv., Inc.*, 512 S.E.2d 818 (Va. 1999) (insubordination is just cause for termination); Robert C. Bird, *Rethinking Wrongful Discharge: A Continuum Approach*, 73 U. Cin. L. Rev. 517, 532 & n.81 (2004); *Dalfort Corp.* v. *International Ass'n of Machinists & Aerospace Workers*, 85 Lab. Arb. (BNA) (June 17, 1985) (upholding suspension for insubordination). For all of these reasons, there must be a zone within which businesses can enforce immediate discipline in the workplace.

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[11] *See, e.g.*, Nat'l Inst. on Alcohol Abuse & Alcoholism of the NIH, *Alcohol Alert, Alcohol and the Workplace* (July 1999), *at* http://pubs.niaaa.nih.gov/publications/aa44.htm ("Drinking among U.S. workers can threaten public safety, impair job performance, and result in costly medical, social, and other problems affecting employees and employers alike. Productivity losses attributed to alcohol were estimated at $119 billion for 1995."). Safety is of paramount concern in the railroad industry because of the potential dangers of heavy equipment moving at high speed, and the industry is governed by elaborate and extensive safety statutes and regulation. *See generally, e.g.*, Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971; 49 C.F.R. pts. 209, 211-214, 217-219.

Suspensions without pay pending investigation are a cornerstone of modern business practice. See Alan M. Koral, *Avoiding Workplace Litigation: When You Write, You May Be Wrong*, 562 PLI/Lit 319, 381 (1997) ("'Suspension pending investigation' is becoming an increasingly popular form of protecting the employer['s] business while it is investigating a possible employee violation."). In many industries such as railroading, employers must be able to remove employees from service immediately. The workplace is decentralized, with mobile work crews often operating far from any centralized base and the scrutiny of a senior executive. It is essential that lower-level line supervisors be able to make immediate interim decisions for the safe operation of the crew—subject to final decisionmaking by the corporate entity. Accordingly, using temporary suspensions pending investigation is necessary and appropriate, and indeed sometimes even mandatory. See 49 C.F.R. § 219.104(a) (requiring railroad to "immediately remove [an] employee from covered service" for alcohol violations); III Tr. 515 (testimony that BNSF employees are immediately removed from service pending investigation for fighting; drugs and alcohol; stealing; and insubordination).

The Sixth Circuit suggests that employers may still suspend employees so long as they do so *with pay*. Pet. App. 24a. But that is no solution at all, because it would systematically and unfairly place employers at substantial economic disadvantage in the usual case when the suspension is legitimate. An employer has no way of knowing prior to an investigation whether a removal from service was based on discrimination prohibited under either section 703 or 704. The Sixth Circuit's rule presents employers with a Hobson's choice. If the suspension is without pay, the employer is automatically liable if discrimination is later found. But if, to avoid liability, the employer must continue to pay a suspended employee for periods when the employee does not work, the employer will have no practical recourse for recovering the money if the suspension is upheld and the employee is ultimately termi-

nated. In many circumstances, employees will have spent their wages and will be effectively judgment-proof. Employers who may only avoid retaliation litigation by paying suspended employees their full, unrecoverable wages for work not performed will be deterred from suspending many employees even if the employee's misconduct clearly warrants the suspension, and even if the suspension is necessary for safety, discipline or efficiency. Nothing in Title VII compels such an aberrant and detrimental result that is contrary to sound business practice.[12]

Furthermore, a temporary suspension without pay that is timely rescinded by senior management is not on the whole unjust to the employee whose suspension was improper and retaliatory. Although in extraordinary cases there may be some hardship during the pendency of the proceeding, a vindicated employee will end up receiving full pay for periods in which, after all, he or she did not have to work and therefore was free to obtain temporary, substitute employment. Indeed, this Court has recognized in other contexts that reinstatement with back pay (and the consequent vindication for the employee) is a substantially comprehensive remedy for improper suspension or dismissal, and that the ordinary incidents of resolving workplace disputes—temporary humiliation and fear of losing a job, and short-term economic difficulties of being without a paycheck—generally must be borne by the employee. *Sampson* v. *Murray*, 415 U.S. 61, 82, 89-90, 92 n.68

[12] The Sixth Circuit gave weight to the fact that the suspension lasted 37 days. Pet. App. 22a. But the length of time it took in this particular case does not determine the general question of whether a rescinded temporary suspension constitutes an "unlawful employment practice" under section 704. Indeed, although not in the record on appeal, the transcript of the investigatory hearing reflects that 11 of the 37 days are attributable to White's own request to postpone the hearing. In any event, the union agreed in the CBA that interests in procedural fairness and decisional accuracy supported a 15-day period of investigation and 10-day period for the Carrier's decision. Plainly, the union and Carrier decided that those interests outweighed any burden on the suspended employee, provided that reinstatement and full back pay would be awarded.

(1974) (noting that absent extraordinary circumstances, "an insufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury, however severely they may affect a particular individual," even though no remedy would be available for such temporary harms under the Back Pay Act). Employers should not be charged with Title VII liability when they correct the initial decisions of lower level supervisors.[13]

II. THE EEOC'S INTERPRETATION OF SECTION 704 TO SUPPORT THE SIXTH CIRCUIT'S RULING IS NOT ENTITLED TO DEFERENCE.

While BNSF clearly prevails under the adverse-employment-action standard as interpreted by this Court, the EEOC has proposed an interpretation of section 704 that cannot be sustained. Specifically, the EEOC interprets section 704(a) to forbid "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." 2 *EEOC Compliance Manual* ¶ 8005, at 6512 (May 20, 1998) (CCH 2005) ("*EEOC 5/98 Manual*"); see *Ray* v. *Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000). This Court should reject the EEOC interpretation.

As a threshold matter, the EEOC's guidelines are entitled to little deference. Congress has not given the EEOC authority to promulgate rules or regulations under Title VII, *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976), and so the

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[13] Because White's damages flowed from the suspension, this Court should remand for a new trial even if it holds that the reassignment of forklift duties was actionable. *United N.Y. & N.J. Sandy Hook Pilots Ass'n* v. *Halecki*, 358 U.S. 613, 619 (1959). The only evidence regarding any injury she allegedly suffered from the latter is her claim that it caused her to cry, 1 Tr. 119-20, which is not the kind of "genuine and serious" anguish that can be compensated as emotional damages. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 157 (2093).

EEOC guidelines "do not receive *Chevron* deference," *Morgan*, 536 U.S. at 110 n.6. Rather, adoption of an EEOC position "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Gilbert*, 429 U.S. at 142 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)); see also *Gonzalez* v. *Oregon*, No. 04-623, 2006 WL 89200, at *8-*10 (U.S. Jan. 17, 2006). The EEOC's guidance reflects none of these values.

The current EEOC guidelines do not represent a longstanding and "contemporaneous interpretation of Title VII." *Gilbert*, 429 U.S. at 142. Far from it. The EEOC first announced the "reasonably likely to deter" formulation in May 1998 (and in so doing expressly disagreed with the prevailing interpretation of the courts, which have primary responsibility for interpreting Title VII). *Compare* 2 *EEOC 5/98 Manual* ¶ 8005, at 6512 & nn.36-37, *with* 2 *EEOC Compliance Manual* §§ 614.1(d), 614.7 (Jan. 1998); see also *Von Gunten*, 243 F.3d at 863 n.1 (rejecting the EEOC standard). If the eight-year delay in promulgating the regulations at issue in *Gilbert* undercut their persuasive force, the 34-year delay here *a fortiori* does so. See also *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (no deference to an EEOC "position [that] was not expressly reflected in its policy guidelines until some 24 years after passage of the statute").

What is more, the May 1998 version of the retaliation guideline conflicts with longstanding EEOC interpretation of section 704(a). In 1984 the EEOC declared that a prima facie case of retaliation "must [be] establish[ed]" "in the same manner" as any claim under section 703. See 2 *EEOC Compliance Manual* § 614.4(a) (July 1984). As late as January 1998, the EEOC continued to state that a prima facie case "can be shown in more or less the same manner as a charge or complaint filed on any other basis under Title VII," 2 *EEOC Compliance Manual* § 614.3(a) (Jan. 1998), and that a com-

plainant need only show "that the respondent took some sort of adverse employment-related action against him," *id.* § 614.1(d); see also 2 *EEOC Compliance Manual* § 614.3(a) (Mar. 1988). The EEOC has proffered "no suggestion that some new source of legislative history ha[s] been discovered," *Gilbert*, 429 U.S. at 145—on the contrary, its newly minted theory was "based on statutory language and policy considerations." 2 *EEOC 5/98 Manual* ¶ 8005, at 6513. This Court discounts unexplained EEOC departures from prior positions. *Arabian Am. Oil Co.*, 499 U.S. at 257 ("[t]he EEOC offers no basis in its experience for the change").

Not only is the current EEOC manual inconsistent with its prior position, but its new interpretation is irreconcilable with Congress's understanding in 1991 when it substantially amended the Civil Rights Act. The adverse-employment-action rubric (which led to the ultimate- and materially adverse-employment-action tests) was by then already well established,[14] and the reasonably-likely-to-deter standard did not arise in the EEOC and Ninth Circuit until years later. Congress made numerous revisions to Title VII in response to disapproved court rulings, see generally H.R. Rep. No. 102-40(I) (1991), but in authorizing damages remedies for section 703 and 704 violations, it is presumed to have ratified the existing judicial understanding of the elements of such a claim. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978); see also *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700-01 (1992); *Her-*

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[14] *See* 1 Barbara Lindemann Schlei & Paul Grossman, *Employment Discrimination Law* 534 (2d ed. 1983); *Petitti* v. *New England Tel. & Tel. Co.*, 909 F.2d 28, 33 (1st Cir. 1990); *Sumner* v. *U.S.P.S.*, 899 F.2d 203, 208-09 (2d Cir. 1990); *Williams* v. *Cerberonics*, 871 F.2d 452, 457 (4th Cir. 1989); *Hill* v. *Mississippi State Empl. Serv.*, 918 F.2d 1233, 1241 (5th Cir. 1990); *Canitia* v. *Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990); *Hamann* v. *Gates Chevrolet, Inc.*, 910 F.2d 1417, 1420 (7th Cir. 1990); *Sherpell* v. *Humnoke Sch. Dist. No. 5*, 874 F.2d 536, 540 (8th Cir. 1989); *Jordan* v. *Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988); *Burrus* v. *United Tel. Co. of Kan., Inc.*, 683 F.2d 339, 343 (10th Cir. 1982); *Bigge* v. *Albertsons, Inc.*, 894 F.2d 1497, 1501 (11th Cir. 1990).

man & MacLean v. *Huddleston*, 459 U.S. 375, 384-86 (1983).

Even aside from such inconsistencies, the EEOC's newly minted position is bereft of "the power to persuade." *Gilbert*, 429 U.S. at 142. The EEOC justifies its new position not with reference to any new developments, but principally on the basis of the unchanged statutory text. The EEOC asserts that section 704(a) is broader than section 703, on the theory that whereas section 704(a) "make[s] it unlawful 'to discriminate' against an individual because of his or her protected activity," "the general anti-discrimination provisions ... make it unlawful to discriminate with respect to an individual's 'terms, conditions, or privileges of employment.'" 2 *EEOC 5/98 Manual* ¶ 8005, at 6513. Read in absolute terms, the EEOC says, section 704 "prohibits *any* form of discrimination against an individual for opposing discrimination or filing a charge." EEOC CA6 Br. at 4 (emphasis added); 2 *EEOC 5/98 Manual* ¶ 8005, at 6513 ("An interpretation of Title VII that permits some forms of retaliation to go unpunished would ... conflict with the language and purpose of the anti-retaliation provisions.").

The EEOC's wooden focus on isolated statutory phrases has little to recommend it as statutory interpretation. It disregards this Court's rule that "[w]e do not ... construe statutory phrases in isolation; we read statutes as a whole," *Morton*, 467 U.S. at 828; ignores the structural relationship between sections 703 and 704; and gives no content to the textual limitation in section 704 prohibiting only an "employment practice" of "discriminat[ing] against" persons engaged in protected activity. See *supra* at 18-19.

In fact, the EEOC does not follow the absolutist interpretation of section 704 that it claims the statutory language compels: "Notwithstanding the broad language of the anti-retaliation provision, the Commission does not mean to suggest that *every* action taken by an employer could form the basis of a retaliation claim." EEOC CA6 Br. at 9. Thus, it opines, section 704 is impliedly limited to prohibiting only

discrimination "that is reasonably likely to deter protected activity." 2 *EEOC 5/98 Manual* ¶ 8005, at 6512-13. As the court below observed, the EEOC cannot wrap its position in the plain language mantle: "[t]he EEOC does not explain how it justifies excluding such discriminatory acts under its strictly literal reading of the statute, which prohibits discrimination without any explicit textual limitation regarding the type of discrimination or level of severity required." Pet. App. 16a. Rather than adopt the EEOC's stance, this Court should read section 704(a) in harmony with section 703(a), in the manner set forth above. Cf. *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432-37 (2002) (interpreting *in pari materia* adjacent statutory provisions that are worded slightly differently, when the terser provision is reasonably interpreted as shorthand for the broader, preceding statutory formulation, and a contrary interpretation would yield odd results).

In all events, the EEOC's "reasonably likely to deter" standard is irreconcilable with the purposes and principled administration of Title VII. *First*, the "expansive" nature of the EEOC's standard, *Pardi* v. *Kaiser Found. Hosp.*, 389 F.3d 840, 850 (9th Cir. 2004), means that the most trivial workplace conduct would become subject to litigation. This is vividly illustrated by the examples the EEOC proffers of how the "reasonably likely to deter" standard operates. The EEOC concludes that a supervisor's one-time retaliatory failure to invite a charging party to lunch with colleagues is not actionable "because it is not reasonably likely to deter protected activity," whereas excluding her from "regular weekly lunches" "could reasonably deter [the charging party] or others from engaging in protected activity," even in the absence of a showing of any change in the terms or conditions of employment or impairment of employment opportunity. 2 *EEOC 5/98 Manual* ¶ 8005, at 6512. The EEOC does not explain how it derives the distinction between occasional and weekly lunches, or why Congress would have countenanced regula-

tion of such trivial actions.[15] Moreover, while the *Ellerth* adverse-employment-action standard requires an act of a supervisor to trigger liability, 524 U.S. at 762, the EEOC standard would broaden section 704 to include claims alleging retaliation by *coworkers* acting within the scope of their employment. 42 U.S.C. § 2000(e)(b) ("employer" includes "any agent"). And any harassment or other employer action that is deemed "reasonably likely to deter" protected activity would be actionable, even though it would not rise to the level of creating a hostile work environment under traditional Title VII principles. 2 *EEOC 5/98 Manual* ¶ 8005, at 6512-13. Section 704 should not be read to open this Pandora's box.[16]

Second, the EEOC's standard is founded on the illogical premise that Congress intended to afford *less* protection to victims of the most hateful forms of discrimination that have historically had the greatest impact on employment—namely, discrimination on the basis of race, color, religion, sex, and national origin—than to persons who are discriminated against solely because of their opposition to certain employer

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[15] Similar examples arise in the Ninth Circuit, the sole court to adopt the EEOC standard. In one case, mere *proposals* to transfer an employee and give him additional supervision—none of which were acted upon—were enough to satisfy the EEOC test. *Moore* v. *California Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 847-48 (9th Cir. 2002). In another case, the Ninth Circuit determined that the "reasonably likely to deter" test was satisfied by, among other things, management having coworkers circulate a petition about the plaintiff's conduct, and withholding the "public recognition" that normally accompanied ten years of service. *Coszalter* v. *City of Salem*, 320 F.3d 968, 976-77 (9th Cir. 2003).

[16] A broader standard of liability under section 704 also creates perverse incentives for an employee to generate even questionable claims under section 703 in order to acquire the expanded protections of section 704. Thus, an underperforming employee who is concerned about adverse steps an employer is about to take against her could file a section 703 charge, and then file a retaliation claim. The employer would face substantial section 704 litigation risk even if the section 703 claim were insubstantial in the first instance, and would be deterred by that risk from taking legitimate, good-faith employment actions.

practices. See *supra* at 17. It would be incongruous indeed to conclude that there would be no liability under section 703 for excluding certain racial groups from weekly lunches (because the exclusion does not affect the terms and conditions of employment or employment opportunities), but to impose liability under section 704 to others left off the lunch-guest list simply because they have already filed a Title VII charge. The better explanation, as courts have held, is that Congress intended discrimination under sections 703 and 704 to be measured by the same standard, which looks to the objective nature of the employment action. See *supra at* 16-21.

Third, the EEOC deterrence standard—whether the adverse action is "reasonably likely to deter *the charging party or others* from engaging in protected activity," 2 *EEOC 5/98 Manual* ¶ 8005, at 6512 (emphasis added)—is not susceptible of principled application. Evaluating whether the retaliation would in fact have deterred the filing of an EEOC charge or other protected activity will depend on a *post hoc* hypothetical calculus of whether the costs of the retaliation to the employee would have outweighed the benefits of the protected activity. To the extent the EEOC would abstract from the circumstances of the individual party, and ask whether *any* Title VII charging party or witness (even one with the most marginal stake in the proceeding) would be deterred by the retaliatory conduct, then section 704 becomes a statute without limit.[17] The employer becomes subject to Title VII liability

[17] It is unclear what exactly the amorphous EEOC standard means, which is one more reason counseling against its adoption. The Ninth Circuit, the only court to adopt the EEOC standard, has interpreted it to be "partially subjective" and to take the individual employee's preferences into account. *Vasquez* v. *County of L.A.*, 349 F.3d 634, 646 (9th Cir. 2003) ("Including behavior of the charging party in the standard removes it from the hypothetical 'reasonable employee' approach and makes it more subjective."). A standard that incorporates subjective preferences will lead to inconsistent enforcement; and no employer can know *ex ante* what types of actions may subject it to liability, much less prevent them. *Compare Dollis* v. *Rubin*, 77 F.3d 777, 782 (5th Cir. 1995) (denying plaintiff a desk audit is alleged to be an adverse employment action), *with*

for almost all untoward conduct of its agents (regardless of the level of harm, 2 *EEOC 5/98 Manual* ¶ 8005, at 6512), and forced to litigate every claim of such conduct. The EEOC standard thus impermissibly encourages retaliation claims based on trivial workplace dissatisfactions.

Finally, of great practical significance, the EEOC's indeterminate standard would magnify the substantial number of retaliation filings, and the costs that they impose upon employers defending against them. Retaliation filings under Title VII nearly doubled between 1992 and 2004, from approximately 10,000 to approximately 20,000, and now constitute a quarter of all Title VII filings. See EEOC, Charge Statistics FY 1992 Through FY 2004, *at* http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2005). This Court

Harris v. *Secretary, U.S. Dep't of the Army*, 119 F.3d 1313, 1319 (8th Cir. 1997) (giving plaintiff a desk audit is alleged to be retaliatory), *and Martin* v. *Frank*, 788 F. Supp. 821, 824 (D. Del. 1992) (requiring overtime is allegedly retaliatory), *with Patel* v. *Allstate Ins. Co.*, 105 F.3d 365, 373 (7th Cir. 1997) (denying overtime is allegedly discriminatory), *and Deavenport* v. *MCI Tel. Corp.*, 973 F. Supp. 1221, 1227 (D. Col. 1997) (plaintiff complained of being "forced" to travel extensively), *with Lawson* v. *McPherson*, 679 F. Supp. 28, 32 (D.D.C. 1986) (plaintiff complained of being denied travel opportunities). *Cf. Fyfe* v. *Curlee*, 902 F.2d 401, 405 (5th Cir. 1990) (raising the opposite of White's claim—namely, that transfer to an *easier* job is retaliatory).

Alternatively, the EEOC standard might refer to a reasonable person in the charging party's individual circumstances. But such a standard would be arbitrary for a different reason; it would mean that the *weaker* the plaintiff's claim or stake in the Title VII proceeding, the *more likely* it is that the employer's alleged conduct would be found to be actionable retaliation. Thus, a court could find that an African-American manager who has clear evidence that he was denied a promotion to an officer position worth hundreds of thousands of dollars in potential income on account of race would not be deterred from pursuing his Title VII claim because his supervisor stopped inviting him to weekly lunches. On the other hand, parties with weaker section 703 claims, or witnesses with no personal stake in a proceeding, may well be deterred by the exact same conduct, and thus have a claim under section 704. A deterrence standard that accounts for either individual preferences or circumstances simply leads to arbitrary enforcement of the statute.

cannot shield its eyes to the fact that, while true retaliation continues to occur, many retaliation claims are asserted by litigious or distrustful employees who are disposed to see retaliatory animus in post-filing employer conduct. If this Court were to adopt the EEOC's standard, which has no bright lines, and under which nearly every question of deterrent effect and retaliatory motive would be a jury question, "the temptation to litigate would be hard to resist," *Faragher*, 524 U.S. at 805. That temptation would be all the greater given the availability now of not only equitable relief and attorneys' fees, but also compensatory and punitive damages. This Court should adopt a standard that promotes rational administration of the Act, rather than dangling the irresistible carrot of an almost-certain jury trial for almost any post-filing supervisory action.

The EEOC has gone astray. The standard for what constitutes an "unlawful employment practice" of discrimination should depend on the objective nature of the employer's conduct. That standard, under section 704 as under section 703, is whether "an employer-sanctioned adverse action officially changing her employment status or situation" was based on prohibited discrimination. *Suders*, 542 U.S. at 134; *Ellerth*, 724 U.S. at 761.[18] Under that standard, BNSF prevails.

CONCLUSION

The judgment should be reversed.

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[18] If this Court were to adopt the EEOC standard, the proper course would be to remand for a new trial under that standard. *Ellerth*, 524 U.S. at 765-66. First, even a deterrence standard should not be applied to interim acts of corporate agents that the employer corrects, and thus BNSF should have judgment as a matter of law on the suspension issue under any standard. Second, the jury did not find that any of the complained-of conduct was "reasonably likely to deter" White from pursuing her claims.

Respectfully submitted,

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STATUTORY APPENDIX

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter—

* * * *

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * *

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of em-

ployment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular

religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of

the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to—

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-5. Enforcement provisions

* * * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government,

governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over pro-

ceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to

the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

* * * *

42 U.S.C. § 2000e-8. Investigations

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such

agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer,

employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing record-keeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority un-

der this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

42 U.S.C. § 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and ap-

propriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by

such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.[19]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

[19] So in original.